SOLID GOLD PUBLISHERS SDN BHD

v.

CHAN WEE HO & ORS

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: 22-78-1996]
20 MAY 1998

CIVIL PROCEDURE: *Anton Piller order - Setting aside - Whether Anton Piller order may be set aside ab initio - Whether exemplary damages may be ordered where Anton Piller order obtained merely to obtain advantage over other party*

COPYRIGHT: *Licensees - Right of action - Whether licensee has same rights of action as owner of copyright - Whether licensee entitled to same remedies - Copyright Act 1987, s. 37*

COPYRIGHT: *Licensees - Proof of - Whether license must be in writing - Whether burden of proving status of licensee is on licensee - Whether especially within knowledge of licensee - Failure to supply information about relationship with principal - Whether adverse inference ought to be drawn - Copyright Act 1987, s. 27(3) - Evidence Act 1950, s. 106*

COPYRIGHT: *Affidavit - Affidavit by person acting as agent - Non-production of letter authorising agent - Whether affidavit not prima facie proof of facts contained therein - Whether adverse inference ought to be drawn for failing to produce authority letter - Copyright Act 1987, s. 42*

COPYRIGHT: *Affidavit - Contents - Whether true copy of work infringed must be annexed to affidavit - Whether infringed works adduced in photostated form amounts to hearsay and inadmissible - Copyright Act 1987, s. 42(1)(c)*

The plaintiff who was suing on behalf of itself and another company ('the plaintiffs'), claimed that they had the copyright to certain items pursuant to an exclusive licence granted by the principal owners. Further to certain investigations, the plaintiffs found that their exclusive right had been breached by the defendants and thus the plaintiffs applied *ex-parte* for an Anton Piller order. As the plaintiffs were successful in their application, the fourth, fifth and sixth defendants ('the applicants') filed this application to set aside the said Anton Piller order. The applicants' contention was that they had a valid agreement with the plaintiffs and that the Anton Piller order was used as a weapon to close down the business of the applicants.

It was in evidence that when the plaintiffs applied *ex-parte* for the Anton Piller order, they did not produce the alleged exclusive licence conferred on them by the principal owners. Further, the affidavit claiming eligibility for copyright, submitted by the agent of the plaintiffs, did not include the letter authorising the said agent to act for the plaintiffs. Neither were there certified documents to show that the works eligible for copyright were true copies. Finally, it was pointed out that the affidavits supporting the plaintiffs' application did not show any authority conferred on them to act on behalf of the other company.

Held:

[1] An exclusive licensee shall have the same rights of action as that of the owner of the copyright and shall be entitled to the same remedies as provided for under s. 37 of the Copyright Act 1987.

[2] If an Anton Piller order is requested merely for purposes of closing down the other party's business or to wreak vengeance, then such an intention is clearly an improper one as it represents an abuse of the purpose of that procedure. To avoid misuse and abuse, it is therefore imperative for the party applying for that order to satisfy the stringent requirements strenuously laid down.

[3] The deponents of the affidavits filed in support of the plaintiffs' claim were only authorised or permitted to affirm on behalf of Solid Gold. There was total absence of authority conferred on these deponents to act on behalf of the other company. Without any supporting evidence adduced on behalf of the other company, the case for that company remained unsubstantiated.

[4] To prove that they are licencees in order to qualify as owners of the copyright, it would be incumbent upon the plaintiffs to adduce credible and admissible evidence. Section 27(3) of the Copyright Act 1987 requires all assignments or licences under the Act to be in writing. The exclusive licence given in this case are matters which were especially within the knowledge of the plaintiffs and thus, pursuant to s. 106 of the Evidence Act 1950, the burden had shifted to them to reveal or prove that fact.

[5] The failure on the part of the plaintiffs to supply the fullest information about the relationship that existed between them and the principal owners would entitle the court to draw a presumption unfavourable to the plaintiffs.

[6] Under s. 42 of the Copyright Act 1987, an affidavit or statutory declaration made by any person claiming to be the owner of the copyright or by his agent, in any of the works eligible for copyright under the said Act, shall be admissible in evidence and shall be *prima facie* proof of the facts contained therein. To fall within the ambit of this provision, any person, say an agent, shall be required to produce such authorisation in writing. Here, however, no such letter of authority was produced. Therefore, the non-production of that authorisation document would not qualify the affidavit to be *prima facie* proof of the facts contained therein. Further, the court is entitled to draw an adverse inference by this failure to produce the letter of authority.

[7] Section 42(1)(c) of the Copyright Act 1987 requires a true copy of the work infringed to be annexed to the affidavit made by the person claiming to be the owner of the copyright or by his agent. Here, there were no such true copies. Instead, the works were merely listed down and, to make matters worse, the works were adduced in a photostated form which, pursuant to the Evidence Act 1950, were inadmissible as they fell within the hearsay rule.

[8] The detriment or injury caused by the plaintiffs resulted in embarrassment and pecuniary loss sustained by the applicants. During the period when the infringed items and the related equipment were detained by the plaintiffs, the business of the applicants connected with those items was at a standstill.

[9] The Anton Piller order was applied for purposes of clubbing the applicants and this exposed the applicants to negative stigma, bad publicity, threats of committal proceedings, indignities and financial losses. Where a party had total disregard for another person's rights, and had caused miseries to that innocent party in the process, by capitalising on the law to procure that advantage, that wrong doer must not be permitted to escape unscathed.

[Anton Piller order set aside ab initio; general and exemplary damages ordered.]

Case(s) referred to:

Asia Television Ltd & Anor v. Mega Video Recording Supply Centre [1985] 1 MLJ 250 ***(cit)***

Cheng Cheung Wang v. Lo Noi Yung & Ors [1984] HKC 575 ***(refd)***

Columbia Picture Industries Inc & Ors v. Robinson & Ors [1987] 1 Ch 38 ***(cit)***

Computerland Corp v. Yew Seng Computers Pte Ltd [l99l] 3 CLJ 2644 ***(cit)***

Durand v. La Patrie Publishing Co Ltd [1952] Ex CR 32 ***(refd)***

Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors [1989] 2 CLJ 1116 ***(cit)***

Kibi (M) Sdn Bhd & Anor v. Cheng Chew Chye & Anor (High Court Johor Bahru, Civil Suit No 22-128-1994) ***(refd)***

Loi Hing Investment Co Ltd v. Macdiarmid & Anor [1990] 1 HKC 64 ***(cit)***
Mg Pein v. MA THE, 2 R 549: 18 IC 1009 ***(cit)***
Milcap Publishing Group AB & Ors v. Coranto Corporation Pty Ltd & Ors [1995] IPR 34 ***(cit)***
Oberster Gerichtshof [1993] European Current Law Year Book 1303 ***(refd)***
PMK Rajah v. Worldwide Commodities Sdn Bhd & Ors [1985] 1 MLJ 86 ***(refd)***
R. v. Oliver [1943] 2 All ER 800 ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Sundram v. Arujunan & Anor [1994] 4 CLJ 300 ***(cit)***
The King v. Kakelo [1923] 2 KB 793 ***(refd)***
William Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor [1991] 2 CLJ 1309 ***(cit)***

Legislation referred to:
Copyright Act 1987, ss. 27(3), 35(5), 37, 42(1), (2)
Evidence Act 1950, ss. 101, 102, 106, 114(g)
Rules of the High Court 1980, O. 29 r. 2

Other source(s) referred to:
European Current Law Year Book, 1993, p 1303
Sarkar on Evidence, 13th edn, p 962
The Supreme Court Practice, 1995, vol 1, part 1, p 535

For the plaintiff - SS Gill; M/s SS Gill & Partners
For the defendants - Goh What Sing; M/s WS Goh & Assoc

Reported by Ling Hea Hoon

JUDGMENT

Suriyadi Halim Omar J:

The history of this case began on 24 October 1996, when the plaintiffs applied for an order as per encl. 3, which in a gist was an Anton Piller order. The application was pursuant to O. 29 r. 2 of the Rules of the High Court 1980, under which provision the court is empowered to pronounce an order of detention, custody or preservation of any property the subject matter of the cause or matter in question. The items to be detained in this case for purposes of preservation, until the hearing of the main suit, were items like discs, videos, laser discs, and equipment connected with the copying of these items. Apart from the above statutory provision provided for in the Rules of the High Court, I was satisfied that the court also had an inherent power to make an order for the detention or preservation of the subject matters (*The Supreme Court Practice*, 1995, vol. 1, part 1, p. 535). This inherent power was in no way at variance with that statutory power.

Copyright is infringed by any person, who, without the consent or licence of the owner of the copyright, imports an article into Malaysia for purposes of selling, letting, distributing either for trading, exhibiting or any purposes that would affect prejudicially the owner of the copyright regarding that article. Such an infringement is actionable at the suit of the owner of that copyright and may be entitled to such remedies permitted by the High Court. In the event an exclusive licence has been granted to a particular party, that exclusive licensee shall have the same rights of action, as that of the owner of the copyright. In similar fashion he shall be entitled to the same remedies as provided for under s. 37 of the Copyright Act 1987 (Act 332).

Returning to the facts of the current case, Solid Gold Publishers Sdn Bhd and Cineart Enterprise Sdn Bhd, hereinafter called "the plaintiffs", were alleged to have copyrights to certain items by assignment *vide* an exclusive license. This licence which was protected by the Copyright Act 1987, conferred on the plaintiffs not only exclusive rights to the films in Malaysia, but also their supervision, *inter alia*, in relation to their reproduction and screening. These exclusive rights concerned Chinese and English films. The principal owners on the other hand were companies that had their bases in Taiwan, Hongkong, Singapore and United States of America. In a gist the plaintiffs were licensees. Pursuant to certain investigations it was found that this exclusive right had been breached by the named defendants as per encl. 3. Having heard the *ex parte* application, and being satisfied with the unchallenged *prima facie* evidence sworn and exhibited in encls. 4, 5, 6 and 7, I allowed the application on 24 October 1996.

On 19 June 1997 the 4th, 5th and 6th defendants, hereinafter called collectively "the applicants" applied for an order *vide* encl. 11, to set aside my Anton Piller order with costs. They also claimed damages. The application, supported by encl. 10 which was the affidavit of the applicants, *inter alia* admitted full co-operation and compliance with my order. Further, to justify their application, the applicants alleged that they had a valid agreement with the plaintiffs, through one Tan Teck Tat, who was carrying on business under the name of STV Enterprise. Even though the agreement was documented, resulting in consequential business transactions between them, the applicants unfortunately never received any letters of termination regarding this contractual relationship. As a consequence of my order, the applicants had suffered shame and financial losses. The bottom line according to the applicants, which culminated in this legal tussle, was really a matter of ringgit and sen after a botched negotiation between the parties. The Anton Piller order was the eventual weapon resorted to by the plaintiffs. If that Anton Piller order was requested merely for purposes of closing down the business of the applicants, or to wreak vengeance then such an intention was clearly an improper one, as it represented an abuse

of the purpose of that procedure. To avoid misuse and abuse, it is therefore imperative that the party applying for that order satisfy the stringent requirements strenuously laid down (*Columbia Picture Industries Inc. and Others v. Robinson and Others* [1987] 1 Ch. 38 at p. 84; *Computerland Corp v. Yew Seng Computers Pte Ltd* [1991] 3 CLJ 2644; [1991] 3 MLJ 201).

In the endeavour to set aside the order given by me, the applicants took an uncompromising view of encls. 4, 5, 6 and 7 which were the supporting affidavits of the plaintiffs. Enclosure 4 was affirmed by one Wong Ming Chan, an investigator, on behalf of Solid Gold; encl. 5 by one Tan Teck Tat, the owner of STV Enterprise who was supposedly authorised to affirm on behalf of Solid Gold and encl. 6, a second affidavit affirmed by Wong Ming Chan but pertaining to investigations carried out on a different premise. Enclosure 7 was an affidavit affirmed by one Kho Rhim Choy who is the pengurus eksekutif of Solid Gold.

A close scrutiny of encls. 4, 5 and 6 showed that these deponents were only authorised or permitted to affirm on behalf of Solid Gold. There was total absence of authority conferred on them to act on behalf of Cineart Enterprise Sdn Bhd. As regards Kho Khim Choy, his authority to act for Cineart Enterprise Sdn. Bhd. was flawed by the fact that, not only did he not hold any position in that company, but also never adduced any evidence to show that he had authority to speak up on its behalf. By not making a full and frank disclosure of these matters, the plaintiffs had committed unmistakable errors thus strengthening the position of the applicants (*Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors* [1989] 2 CLJ 1116; [1989] 3 MLJ 456).

To summarise, without any supporting evidence adduced on behalf of Cineart Enterprise Sdn Bhd, the case for the latter therefore remained unsubstantiated.

Apart from the dearth of authority to act on behalf of Cineart Enterprise Sdn Bhd by these three deponents, I detected certain evidential errors which had weakened tremendously the position of the plaintiffs. These evidential errors were also connected to authority, *vis-a-vis* Solid Gold, and could be split into three, namely:

1. the exclusive licence given to Solid Gold by the principal owners who were overseas based;
2. the authority given by Solid Gold to that investigator who was their agent; and
3. the written authority received by the investigator from Solid Gold.

Under s. 37(5) of the Copyright Act 1987, an owner of the copyright means the first owner or an assignee, as the case may be, of the relevant part of the copyright. By due construction of the provision, it is quite safe to conclude that the assignee is not the first owner, as he is a person who has been conferred with that exclusive right or licence to deal with the infringed items as consented to or licensed by the latter. To prove that they are licensees, to qualify as owners of the copyright, it would be incumbent upon the plaintiffs to adduce credible and admissible evidence ie, the very basis of their claim. The success of that exercise not only must encompass Solid Gold but also Cineart Enterprise Sdn. Bhd. This is so as Solid Gold not only was litigating on its own behalf but also for Cineart Enterprise Sdn Bhd.

The abovementioned exclusive licence given to Solid Gold, or authorisation conferred on that agent, are matters which were especially within their knowledge. Under s. 106 of the Evidence Act 1950 (Act 56) (Revised 1971), in that kind of situation, the burden of proving those facts rest on those persons who have that peculiar knowledge. One of the illustrations made available under that provision is that, if A is charged with travelling in a railway, the burden of proving that he had a ticket is on him. In this case as that peculiar knowledge was known by the plaintiffs then that burden had shifted to them to reveal or prove that fact.

Apart from that provision of the Evidence Act, the other obstacle required to be cleared by the plaintiffs, is s. 42 of the Copyright Act 1987. Under this section, an affidavit or statutory declaration made before any person having authority to administer oath, by any person claiming to be the owner of the copyright or by his agent, in any of the works eligible for copyright under this Act, shall be admissible in evidence and shall be *prima facie* proof of the facts contained therein. To fall within the ambit of this provision, any person, say an agent, shall be required to produce such authorisation in writing. By the canon of construction this evidential requirement which is provided for under s. 42(2) is mandatory in nature. I interpret it to mean that the non-production of that authorisation document would not qualify the contents of the relevant affidavit to be *prima facie* proof of the facts contained therein.

I now come to the specific evidence of the failure of the plaintiffs to submit the exclusive licence conferred on them by the principal owners. Mr. Rho Rhim Choy who is the pengurus eksekutif of Solid Gold had alleged that the latter owned the exclusive licence and copyright over the impugned items. By virtue of this licence certain liabilities and rights had arisen. It is trite that, where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liablity has been incurred, to prove that the things prescribed by the Act has actually been done (*Sarkar on Evidence* 13th edn).

The idea of s. 106 shifting the burden is certainly not intended to relieve a particular plaintiff, or prosecution depending on the case, of its burden of proof under s. 101 or s. 102 of the Evidence Act, but designed to meet certain exceptional cases. No doubt if that knowledge is as much available to the plaintiff, then, that fact cannot be construed as especially within the knowledge of that other person. If the ingredients of s. 106 are present then, as Sankey J in *The King v. Kakelo* [1923] 2 KB 793 at p. 795 said:

> ... we think that the burden of proof may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively ...

In *R. v. Oliver* [1943] 2 All ER 800 the court in no uncertain terms said that whether the appellant had a licence, was a fact perculiarly within his own knowledge, and proof of the fact that he had a licence, lay upon him. In the current case, the plaintiffs were supposed to have obtained that exclusive licence from the principal owners who were overseas-based, and as such was in possession of that peculiar knowledge. As a consequence of this failure to supply the fullest information about the relationship that existed between Solid Gold and the overseas owners, and hence reshift the burden to the applicants, the court was entitled to draw a presumption unfavourable to the plaintiff (*Sarkar on Evidence*, 13th edn, p. 962 and *Mg Pein v. MA THE*, 2 R 549: 18 IC 1009; s. 114(g) of the Evidence Act 1950).

Mr. Goh for the applicants, not to be left out, similarly pressed home this point, by ventilating that due to that failure of producing the licence, they would thus have failed to conclusively prove their *locus standi* or right to initiate this action. Shorn of all legal semantics, the issue of authority could easily have been resolved, as all assignments or licences under this relevant Act must be in writing. Section 27(3) of the Copyright Act 1987 (Act 332) reads:

> No assignment of copyright and no licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing.

Even though this Guaman Sivil did not go through the process of hearing witnesses as in a normal trial, there was nothing in law to prevent the court from invoking its inherent jurisdiction, to conclude that this action was not properly brought before it for want of authority (*William Jacks & Co. (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor* [1991] 2 CLJ 1309; [1991] 2 MLJ 555). This non-submission of that licence, graciously acceded by counsel for the plaintiffs, was aggravated further by the inaction of the plaintiffs to supply that licence through supplementary affidavits eventhough the case had been postponed several times for some unconnected reasons.

To stretch further this issue of status of the plaintiff, it was held at para. 1677 of Cases From Empire Digest from the case of *Durand v. La Patrie Publishing Co Ltd* [1952] Ex CR 32 (Can):

> (1) in an action for infringement of copyright defendant is entitled to have full particulars as to the status of a plaintiff instituting proceedings against him ...
>
> (3) assuming plaintiff ... holds whatever rights it possesses therein under assignments or licenses, particulars as to the manner in which its title is derived from the author and composer are required since it is a material fact on which plaintiff necessarily relies to make his case. If not so alleged in the action defendant is totally unaware of the nature of plaintiff's claim to title and unable satisfactorily to prepare a defence.

At para. 1303 *In European Current Law Year Book* 1993 as per the case *Oberster Gerichtshof* (4 Ob 106/91, 18 February 1992) [1992] GRUB Int. 932 is written:

> and where a firm selling films on video cassettes claims an exclusive distribution right for a country, it must prove that the necessary unbroken chain of contracts exists between it and the original producer of the film leading to such exclusive rights. A mere reference to such an agreement will not suffice.

If a mere reference to the existence of an agreement is insufficient to prove an exclusive right, the position of the plaintiffs had become more intolerable as the heavy burden of proving that exclusive right had statutorily been shifted to them. The adverse inference taken against them was no help either. At the local scene, in the case of *Kibi (M) Sdn Bhd & Anor v. Cheng Chew Chye & Anor* Civil Suit No. 22-128-1994 High Court, Johor Bahru Mohd Ghazali J had occasion to opine that, facts relating to the assignment agreement as alleged by the plaintiff were important facts which ought to be disclosed to the judge when applying for the Anton Piller order.

I now come to the issue of the non-disclosure by the Investigator of the letter of authority. Similar to the case of the plaintiffs, the authorisation letter which comes within s. 42(2) would be a fact that is within the knowledge of Wong Ming Chan, hence the applicability of s. 106 of the Evidence Act. I would conclude that the non-disclosure either meant that the authority was not in writing or there never was any authority given to that agent. Either way s. 42(2) of the Copyright Act was not complied with and I was entitled to invoke an adverse inference as against that agent (*Sundram v. Arujunan & Anor* [1994] 3 MLJ p. 361 especially at p. 372*).*

Regarding the relationship between that investigator and Mr. Kho Khim Choy, by virtue of the fact that the former was supposed to be his agent, it was therefore incumbent upon Mr. Kho Khim Choy, as the principal to show the

precise scope of the authority he had conferred upon that agent. This was a matter that was especially within his knowledge. Again, strangely enough, there was absolutely nothing in encl. 7 to show that Solid Gold or Cineart Enterprise Sdn. Bhd. had authorised that investigator to act on their behalf. Some proof of minutes would have been more than sufficient to constitute some authorisation to discharge the burden under s. 106 of the Evidence Act.

Under s. 42(1) of the Copyright Act, whether as an owner or as an agent, when an affidavit or statutory declaration is made, sub-s. (1)(c) requires an annexing of the true copy of the work infringed. Once that is done, that affidavit or statutory declaration shall be admissible in evidence in any proceedings under the Act, and shall be *prima facie* proof of the facts contained therein. With regard to all the supporting encls. *viz.* 4, 5, 6 and 7 none of them had enclosed certified documents to show that the works eligible for copyright were true copies. Instead the works were merely listed down. To aggravate matters, the works were adduced in a photostated form, which unless excepted, pursuant to the Evidence Act, were inadmissible as they fell within the hearsay rule.

Sifting the evidence further, I now touch on the details of the statements of the plaintiffs. Mr. Tan Teck Tat, the solitary owner of Syarikat STV Enterprise who affirmed on behalf of Solid Gold at para. 7 of encl. 5, admitted that the latter had entered into an agreement with New Memory Video Enterprise (1st defendant). Unfortunately this written document was never exhibited. This person further affirmed that the 2nd and 3rd defendants had also transacted in infringed copies but said nothing of the 4th, 5th and 6th defendants thus letting them off the hook. The evidence of Wong Ming Chan, the supposed investigator for Solid Gold, already eliminated, could not be accepted as her authority was never established. I was thus left only with the last piece of evidence ie, the affidavit of Mr. Kho Kim Choy. He at para. II of encl. 7, merely said that he believed, as was advised by his agents, that the applicants had carried out the business of the relevant films without his permission. He did not mention at all the source of his information nor the personality who provided him with that information. If that belief was based on the rejected evidence of Wong Ming Chan, than that belief could be discounted. As it was without any foundation, or hearsay based, I therefore rejected the evidence as regards that belief.

As said earlier, it was alleged by Mr. Tan Teck Tat, as per encl. 5 of para. 7, that a written agreement existed between the plaintiffs, through STV Enterprise with New Memory Video Enterprise. Unfortunately that agreement was not exhibited, the disclosure of which would have greatly assisted the court in its endeavour to get to the bottom of things. By admitting that a business

agreement did exist between Solid Gold and New Memory Video Enterprise, the probability of a business agreement in existence between STV Enterprise and the 4th, 5th and 6th defendants, as alleged, could not now be discounted. To substantiate their assertions, the applicants had exhibited GKS 3, GKS 4 and GKS 5. As could be gauged from these invoices, delivery notes and receipts of cash sales, the plaintiffs could not deny that a business relationship did exist between STV Enterprise and the applicants. What caused me to view negatively the attitude of the plaintiffs were their outright unwillingness to disclose that relationship between the applicants and the plaintiffs via STV Enterprise. That relationship was highly material to the issue at hand. On those premises it necessitated me to invoke s. 114(g) of the Evidence Act against them.

The elimination of Cineart's case, as clarified earlier also created additional problems, as thenceforth I was faced with a mass of information which encompassed the jumbled up properties of Solid Gold and Cineart Enterprise Sdn Bhd. As a result of poor drafting in the affidavits, I was unable to separate and identify the items owned by Solid Gold, which were supposed to have been infringed. It must be stressed that it is never the duty of a judge to unravel a knotted scenario created by poor preparation and be partisan to the cause of any of the parties.

With all the plaintiffs' "evidence" eliminated, in particular their exclusive rights to the infringed items not proved, there were no more material facts left for my consideration. To be material a fact does not have to be one which would have caused the application to be refused. The point is that, a fact which ought to have been disclosed but was not, and had it been disclosed, would have resulted in the giving of further attention to other connected matters (*Milcap Publishing Group AB and Others v. Coranto Corporation Pty Ltd and Others* [1995] IPR 34). With such telling and fatal flaws, in the case of the plaintiffs, I therefore had to succumb to the arguments of the applicants and set aside my original order *ab initio* (*Asia Television Ltd. & Anor v. Mega Video Recording Supply Centre* [1985] 1 MLJ 250). Regarding this matter Deputy Judge Barnett in *Cheng Cheung Wang v. Lo Noi Yung & Ors* [1984] HKC 575 at p. 578 had this to say:

> It is clear therefore that an Anton Piller order is a rare and exceptional creature. It will be made where, *inter alia*, incriminating documents or things are likely to be destroyed ... Where an Anton Piller is made on the wrong basis, the court has Jurisdiction to discharge the order ab initio - *Randolph M Fields & Anor v Watts* & Ors (CA) (The Times, 22 November 1984, unreported).

Similarly in *PMK Rajah v. Worldwide Commodities Sdn. Bhd. & Ors.* [1985] 1 MLJ 86 Zakaria Yatim J (as he then was) in strong terms commented that if in applying for and obtaining an *exparte* order of an Anton Piller order, the plaintiff had either misrepresented or suppressed material facts, the order would be dissolved on that ground itself (on this point see also *Loi Hing Investment Co Ltd v. Macdiarmid & Anor* [1990] 1 HKC 64 and Milcap Publishing *Group AB and Others v. Coranto Corporation Pty Ltd and Others (supra).* As for the current case, apart from the suppression of material facts, I was armed with other reasons which permitted me to set aside my initial order. They were:

1. the absence of *locus standi* of the deponents of the affidavits;
2. the absence of supporting evidence due to their inadmissibility;
3. the confusion of ownership of the infringed items;
4. the unsubstantiated case of Cineart Enterprise Sdn Bhd; and
5. the invocation of s. 114(g) not only with regard to the above matters but also for the plaintiffs' glaring unwillingness to admit to a probable business relationship existing between the applicants and the plaintiffs through STV Enterprise.

Apart from setting the order aside I ordered general damages as well as exemplary damages to be assessed by the senior assistant registrar. Suffice for me to conclude that the detriment or injury sustained by the applicants caused by the plaintiffs, resulted in embarrassment and pecuniary loss. During the period when the infringed items and the related equipment were detained by the plaintiffs, the business of the applicants connected with those items, was at a standstill. As regards the exemplary damages I take solace in the remarks of Lord Devlin in *Rookes v. Barnard* [1964] AC 1129 especially at p. 1226 which reads:

> ... there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal.

In the current case I was satisfied that this whole proceeding emanated from a botched negotiation, with the Anton Piller order eventually applied for purposes of "clubbing" the applicants. The subsequent affidavits submitted by the deponents on behalf of the plaintiffs, confirmed that the application of the latter was motivated by business greed, with that arm twisting technique utilised to squeeze the last drop of advantage. Their arbitrary acts exposed

the applicants to negative stigma, bad publicity, threats of committal proceedings, indignities and financial losses. It therefore was essential that where a party had total disregard for another person's rights, and had caused miseries to that innocent party in the process, by capitalising on the law to procure that advantage, that wrong does must not be permitted to escape unscathed. It was therefore imperative in the current case that the plaintiffs' misconceived action, which was in line with their personal agenda, and which had breached the law with impunity, should not be let off lightly. It was on the above grounds that I made the necessary orders with costs.